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86-1186 (1)

No.

Supreme Court, U.S.
FILED
DEC 29 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

CLEMENT J. PACYNA, PETITIONER

v.

JOHN O. MARSH, Jr., SECRETARY OF THE ARMY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

1. Under 5 U.S.C. 702, a person suffering legal wrong because of agency action, or adversely affected, or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. §702 states in part:

> "An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States."

Is the decision of the court of appeals, that suit is barred on the statute of limitations §2401, supported by substantial evidence or law, not legal error, arbitrary or capricious, and not otherwise contrary to law and an infringement on Amendment rights because the petitioner's suit is bifurcated as a monetary claim under 28 U.S.C. 1346 and

non-monetary claim under 28 U.S.C. 1361 permitted by 10 U.S.C. 1552, with suit filed in 1983 challenging the Army Board for Correction of Military Records' own legal wrong committed in 1981 and 1982 ?

2. Did the district court and the court of appeals apply the correct standard of review to petitioner's claims because the apparent conflict between decision which is subject of petition and decisions of court of appeals for other circuits, firmly rooted in case law, compelled the Supreme Court to grant certiorari under similar circumstances ?

3. Whether the court of appeals has so far departed from the accepted and usual federal proceedings and question of federal law and so far sanctioned such departure by the district court, as to call for an exercise of the Supreme Court's power of supervision on a veteran's claim ?

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IN THE SUPREME COURT OF THE UNITED STATES

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The Judgment/Order of the court of appeals (App. A1-A4) and the Judgment/Order of the district court (App. B1-B8) are unreported. The final decision of the Army Board for Correction of Military Records (ABCMR) is found in the appendix hereto at E1-E2.

JURISDICTION

The Judgment of the court of appeals

was entered on November 13, 1986. The petition for a writ of certiorari was filed on January 7, 1987. The United States Supreme Court granted petitioner's prior certiorari in this case. (App. C1). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISION INVOLVED

1. CONSTITUTION, Amend. I provides:

> No person shall be denied redress.

2. CONSTITUTION, Amend V provides:

> No person shall be denied due process of law.

3. CONSTITUTION, Amend XIV provides:

> No person shall be denied equal protection of law.

4. 5 U.S.C. 702 provides for "Right of Review". Section 702, as amended in 1976, states that an:

> "action in a court of the United States seeking relief other that (sic) money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official

capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States."

5. 28 U.S.C. 1346(a)(2) provides in pertinent part:

Jurisdiction of district court on monetary award waived over $10,000.00 against the government.

6. 28 U.S.C. 1295(a)(2) provides:

Jurisdiction of the United States Court of Appeals for the Federal Circuit of an appeal from a final decision of a district court based on §1346(a)(2), supra. See App. C1.

7. 28 U.S.C. 1631 provides:

Transfer to cure want of jurisdiction in the interest of justice. See App. C1.

8. 28 U.S.C. 1361 provides:

Action in the nature of mandamus to compel an officer of the United States ... to perform a duty owed to the Plaintiff.

9. 10 U.S.C. 1552 provides in part:

(a) The Secretary of a military department, under procedures established by him and approved by the Secretary of Defense, and acting through boards of civilians of the executive part of that military department,

> may correct any military record of that department when it considers it necessary to correct an error or remove an injustice. Except when procured by fraud, a correction under this section is final and conclusive on all officers of the United States.
>
> (b) No correction may be made under subsection (a) unless the claimant or his heir or legal representative files a request therefor before 26 October 1961, or within three years after he discovers the error or injustice, whichever is later.1/ However, a board established under subsection (a) may excuse a failure to file within three years after discovery if it finds it to be in the interest of justice.

10. Army Regulation (AR) 15-185 provides in pertinent part:

> 1. Scope and applicability. This regulation establishes procedures for making applications, for the correction of military records by the Secretary of the Army acting through the Army Board for Correction of Military Records (hereafter referred to as the board or ABCMR).
>
> 2. Authority. 10 U.S.C. 1552.

---

1. Petitioner first discovered the Army's violations of its own regulations and denial of his promotion based on an incomplete application in 1980.

> 20. Action by Secretary of the Army. ... the Secretary of the Army who will direct such action in each case as he/she determines to be appropriate.

11. AR 610-15, paragraph 3c, governed by 10 U.S.C. 591a provides:

> "Applicants for appointment in the counterintelligence career warrant must, in addition to fulfilling requirements of a above, fulfil the applicable requirements of AR 600-148."

12. AR 600-148 provides in pertinent part:

> 5.b(1) "Waivers. Waivers of any of the prerequistes prescribed in a above, except citizenship, may be requested. Waivers will be confined to personnel who do not have the prerequisites, but have demonstrated ability, high mental capacity, or outstanding performances of duty to a degree which compensates for the lack of the prerequisites for which waivers are requested."2/

> 5.b(2) "Request for waivers will state the prerequisites for which waivers are requested, and will give full information concerning the back-

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2. Petitioner met all of the required prerequisites except two years college for which he more than compensated and for which waiver was authorized and approved.

ground, prior service, and any special qualifications the individual may possess. The individual's immediate commander will comment on the request for waivers, recommending approval or disapproval with the reasons therefor." 3/

7.d. "All headquarters or agencies in the chain of command will process applications not accompanied by the aforementioned documents and photographs will be returned to the applicant for compliance with these provisions. 4/

7.e and 9.c. "Upon disapproval because of the absence of vacancies or for other reasons, the applicant will be notified accordingly by The Adjutant General/army commander", respectively.5/

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3. Request for waiver and commander's comment is the only document missing from Army files and case, which the Army lost.

4. CIC ruled on an incomplete application and violated said Army regulations by its failure to return petitioner's application for completion/compliance as required.

5. The Army in violation of its own regulations, although it notified petitioner that he was not favorably considered for appointment as warrant officer, failed to notify him of the regulatory reasons for the disapproval.

STATEMENT

1. The petitioner is 67 years of age and a native American citizen. In 1962, petitioner's retirement from the United States Army with over 20 years active military service was approved pursuant to 10 U.S.C.3914. He is currently retired in the grade of Master Sergeant (E7) but remains a member of the Regular Army for life, pursuant to 28 U.S.C.3075(a)&(b).

2. Petitioner's military service included ten (10) years overseas duty. He is a veteran encompassing World War II, Korea and Vietnam, in the interest of national security and defense. He held various and important investigative agent assignments in foreign and domestic intelligence field operations and administrative functions, including adjudication on security surveys and inspections of Advanced (Nuclear) Weapons, having held Top Secret, Cryptographic and Cosmic

classified security clearances in the performance of his duties. He had an exemplary service record both in combat and as a counterintelligence agent [6/] and served his country honorably and faithfully as a member of the military service.

3. Petitioner's army retirement was precipated by the fact that he was understandably discouraged having been locked in his same sergeant rank for over ten years, with promotion having been denied in Circa 1952 and the reason kept from him, notwithstanding he had a superior character and efficiency rating for ten years previously.

4. In 1951, petitioner applied for appointment as warrant officer in the Counterintelligence Corps (CIC) in accordance with applicable Army Regulations (AR) 610-15 and AR 600-148, supra.

6. Attested to by Appellee in his Memorandum of Law to his motion to dismiss, dated June 2, 1983.

5. In a letter, dated 22 January 1952, petitioner was notified through the Army chain of command that he had been selected for appointment by his First Army Headquarters and that his application was forwarded to The Adjutant General (TAG) in accordance with current directives. However, TAG had informed that headquarters that petitioner's appointment ... was not favorably considered.

Significantly, the only documentation petitioner had in his possession prior to 1979, relative to his application for appointment, was the letter, supra, which notified him that his promotion had been denied, failed to contain any reasons for the disapproval. App. D.

6. Immediately thereafter the denial in 1952, attempts to obtain the reasons met with the Army's directive "you don't question higher authority" (48).[7/]

7. Indicates page of appendix to petitioner's brief to the Court of Appeals.

7. Petitioner's superior officers' Affidavit sworn 15 June 1981 and a Letter dated 21 June 1982 attest to his being more than worthy of appointment and question lack of reason for the denial, respectively (46,47 and 49).[7/]

8. The denial of petitioner's advancement to warrant officer permanently injured his army career and he reluctantly therefore retired in 1962, supra.

9. Commencing in December 1978, under the Freedom of Information Act, petitioner sought copies of official Army records and regulations relating to his warrant officer application and denial. The Army furnished all of the documents, except petitioner's request for educational waiver and his immediate commander's statement thereof, which was reported not on record (34,35).[7/]

10. On the basis of the documents furnished, supra, petitioner learned for

the first time, Circa 1979-80, that the Army was prevalent in violations of its own regulations in denying him appointment as warrant officer in 1952.

Petitioner learned that his application as warrant officer was recommended by his immediate and next highest superior officer, and by a qualified and competent review board, which rated him "superior" for moral character and general fitness and a final rating of "excellent" for appointment, and was "approved" by his First Army Commanding General (31,32).[7] and that the Surgeon General qualified him physically for appointment (99).[8]

Petitioner further learned, significantly, the notification he received that his appointment had been denied, failed to contain any reasons for the disapproval, App. D, but were required pursuant to AR 600-148, par. 7e, supra.

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8. Indicates page of certified record on appeal.

Petitioner furthermore learned, significantly, that denial of his appointment was based on an incomplete application, absent his request for educational waiver and commander's statement, supra, required pursuant to AR 600-148, par 5b (2), and furthermore required return to petitioner for re-completion and re-submittance, pursuant to AR 600-148, par. 7d, governed by §591a, supra.

In addition, the correspondence transmitted from TAG to CIC and return include eight inclosures, absent the waiver and commander's statement, supra, relative to petitioner's application (99, 100 and 101),[8/] first discovered in 1980 by petitioner, supra.

11. From the foregoing, it is clear on the face of the record that TAG had no authority to deny petitioner's appointment, and that TAG violated Constitutional, statutory and regulatory provisions.

12. On 13 June 1980 petitioner filed an application with 31 inclosures with the ABCMR seeking reversal of the prior determination which denied his advancement to warrant officer status, and requesting back pay from date of denial and appropriate warrant officer grade he would have achieved upon his retirement. His application to the ABCMR was predicated under the provision to recover on liability created by Statute 10 U.S.C.1552(a)& (b), which provides for correction of an error or removal of injustice, in the interest of justice, supra.

13. Via determination on 12 January 1981, the ABCMR denied petitioner's application. The petitioner then requested reconsideration on 30 June 1981. The ABCMR denied the application on 24 March 1982 finding: "Applicant has failed to submit sufficient relevant evidence to demonstrate the existence of probable material

error or injustice" (50,52).[7/]

14. Pursuant to AR 15-185, supra, petitioner thereafter sought appeal (53, 54),[7/] which was subsequently denied by the ABCMR in a letter on 7 June 1982, (55,56).[7/] The ABCMR's subsequent letter on 20 July 1982, in part states substantially that the denial constituted final agency action; that petitioner was not barred from asking for reconsideration upon discovery of additional substantive evidence; and that petitioner has the right to institute action in a Federal Court. App. E.

15. Thereafter, petitioner commenced suit in the federal district court on 23 February 1983 pursuant to 10 U.S.C. 1552 and 28 U.S.C. 1346 and 1361 arguing denial of his application for warrant officer appointment, constituted an abuse of discretion, was unsupported by substantive evidence, was violative of due process and equal protection rights, was

against the great weight of evidence, and constituted an administrative action arbitrary and capricious in nature, and was in violation by the Army of its own regulations. Petitioner's Complaint is (59, 62).[7/]

16. Following cross motions for summary judgment, the district court entered its determination granting the Appellee's motion and dismissing the petitioner's cause of action. App. B1.

17. Significantly, respondent had abandoned his denial of violations in his motion grounds to dismiss. App. B2.

18. The court of appeals affirmed the district court's Judgment that granted Appellee Secretary of the Army summary judgment and dismissed as barred by the statute of limitations (28 U.S.C. 2401) Clement J. Pacyna's complaint seeking review of the decisions by the ABCMR. App. A1-A4.

19. The basis for federal jurisdiction in the district court is found in 10 U.S. C. 1552 and 28 U.S.C. 1346 and 1361.

ARGUMENT

At the outset, petitioner notes that there is a Constitutional and statutory defect in the decision below. The Court of Appeals for the Federal Circuit lacked legal authority to deny petitioner's appeal to review the ABCMR's decision in 1982, because 5 U.S.C. 702 provides for "Right of Review" of wrong permitted by 10 U.S.C. 1552 and 28 U.S.C. 1361, and Amendments I, V and XIV provide for "redress", "due process" and "equal protection" of law, respectively.

In addition to the foregoing, the petitioner seeks allowance of his petition for a writ of certiorari for the following independent reasons:

a. the court of appeals has so far departed from the accepted and usual

course of judicial proceedings,

b. the court of appeals has so far sanctioned the departure from accepted and usual judicial proceedings by the district court, and

c. the court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

To help clarify the issues involving this case, the petitioner's suit is based on not one but two separate issues, under S1346 for monetary relief and under S1361 for non-monetary or promotion relief under S1552.

Neither the district court nor the court of appeals addressed petitioner's allegations of the ABCMR's own wrong in 1982 relative to his S1361 suit in 1983.

The ABCMR DECISION

The ABCMR final decision in 1982, that there is no material error or injustice in the Department's denial of Sergeant Pacyna's application for appointment as warrant officer in 1952, supported by substantial evidence, is wrong on its face, arbitrary and capricious, and is otherwise contrary to Constitutional, statutory and regulatory provisions, supra.

Significantly, the Respondent does not deny petitioner's claims of the Army's violations in 1952 nor the ABCMR's wrong in 1981-82, as it is not a ground in his motion to dismiss the suit. App. B2, (63).[7/]

Therefore, the only issue before This Court is that the courts below barred suit on the Respondent's ground to dismiss on statute of limitations. Consequently, upon this Court's finding suit has "Right of Review" under S702, supra, reversal is due.

Nevertheless, to show that the ABCMR

did indeed commit wrong in its denial in this case, the following supported substantial question asked is: "What about the documents the petitioner submitted, referred to herein and had by the ABCMR?

At App. D is the letter dated 22 January 1952, which notified applicant of disapproval of his appointment, but are absent the reasons required under AR 600-148, par. 7e and 8c, supra.

At (99, 100, 101) [8/] are the correspondence from TAG to CIC and return which shows eight inclosures, indicating said agencies ruled on an incomplete application, because absent is the applicant's waiver request and commander's statement, which, the only document relative to his application for promotion, is not a matter of record (34,35) [7/] but which is required pursuant to AR 600-148, par. 5b, and in addition incomplete applications were required to be returned to the appli-

cant under AR 600-148, par. 7d, supra.

At (48) [7/] is the Affidavit sworn to by Applicant, under penalty of perjury, that shows when he attempted to know the reasons for denial of his appointment, the Army's directive was: "You don't question higher authority", a clear violation of his amendment rights, supra.

At (100,101) [8/] is the damaging unfavorable decision by CIC, which did not state applicant's waiver requested is disapproved, a consistent response, but instead questionably states: "Record of service as enlisted man with CIC does not warrant granting the educational waiver necessary under AR 600-148". This is evident that CIC did not have the waiver request, which contained applicant's prerequisites and commander's comment with approval required by par. 5b, supra, and in that said document is missing, supra.

Petitioner contends, that the viola-

tions by the Army of its own regulations and its obstructing his amendment rights in 1952, supra, directly prevented his appointment as warrant officer, and his distinguished military record bore a "blemish" which remained until his retirement in 1962 and continues to remain.

Further, this unlawful rejection hampered his ability to advance in rank, thereby effecting his army pay and retirement benefits.

Furthermore, that had he been notified of the reasons for disapproval, and not been denied inquiry, doubtless efforts could have been made in 1952 to remedy the situation by him and his commanding and superior officers who were quite enthusiastic about petitioner's appointment.

The District Court Decision

The district court found that the suit is barred by the statite of limitations under 28 U.S.C. 2401.

The petitioner contends that the district court's finding is clearly erroneous, arbitrary, capricious and contrary to law. Further, that the district court applied the wrong standard of review to petitioner's or veteran's suit.

The district court's opinion that petitioner cannot revive his claim by applying to the ABCMR in 1981 and claiming that the 1982 decision revived the jurisdictional statute, and thusly the 1983 suit is barred, is without basis of fact and law and is contrary to §1346, §1361, §1552 and §702, supra, respectively.

Petitioner contends that his cause of action is a claim on a basis of law under §1346 and §1361, and on a basis of fact and law under §1552 sufficient to demand

judicial attention in light of the ABCMR' own wrong committed in 1981 and 1982, not the Army's wrong, which indeed was, committed in 1952, supra. Therefore petitioner's suit in 1983 on the basis of the ABCMR' final agency action by misrepresentation in 1982, cannot be barred under any existing law.

The standard of review to petitioner's claims by summary judgment was therefore "erroneous" to say the least, because facts exist and a substantial question of law is involved. Stauffer Laboratories, Inc. v. Federal Trade Comm., supra.

A finding is clearly erroneous, when, although there is evidence to support it, the reviewing court upon reviewing the entire evidence is left with the definite and firm conviction that a mistake has been committed. U.S. v. United States Gypsum Co.(1948), supra. The foregoing decision of the ABCMR shows it is mis-

taken and did not address or it misrepresented the petitioner's claims, as also did the district court.

In fact or effect, Appellee supported remand. In the brief for Appellee, at page 8 thereof, to the court of appeals, doubt was cast on the district court not having addressed the issues claimed in petitioner's complaint and cross motion papers relative to the ABCMR' own wrong in Circa 1981-82. The Appellee suggested "the court could remand the case for consideration of matters not briefed, argued, or decided below", citing Sammt v. United States, 780 F.2d 31 (1986).

It is necessary to note, that the ABCMR final decision offered reconsideration and did not time bar petitioner's claims, which is contrary to Appellee's ground to time bar in his motion to dismiss, after suit was filed, supra.

The district court's finding or re-

liance on the Appellee's case law or defense: United States v. Kubrick and Konecny v. United States, supra, is misplaced and not applicable to petitioner's or military veteran's case conferred by §1552. In Kubrick it was a tort injury claim. In Konecny it was an action against the United States for alleged taking of his property as a result of fluctuation of level of lake because of operation of government flood control dam.

REASONS FOR GRANTING THE WRIT

1) THE DECISION OF THE COURT OF APPEALS IN THIS CASE IS CONTRARY TO STATUTORY PROVISIONS AND IS AN INFRINGEMENT ON AMENDMENT RIGHTS.

As aforementioned, an action under §1361 permitted by §1552 shall not be dismissed nor relief denied under §702.

Therefore, the decision of the court of appeals that suit is barred by the statute of limitations on the basis that:

"Appellant's argument that we must review the ABCMR's 1981 and 1982 decisions concerning a matter that accrued 31 years before this suit is contrary to law",

supported by substantial evidence and law, is legal wrong on its face, perverted, obfuscated, arbitrary, capricious, and is otherwise contrary to §702 and an infringement on amendment rights, supra.

Petitioner contends that his 1983 suit is on a final action accrued in 1982 by reason of the ABCMR's own wrong, not the allegations of prior Army wrong, which

indeed did occur in 1952; is an action to recover on liability created by statute §1552; is predicated on a writ of mandamus under §1361; is of a Constitutional, statutory and regulatory nature; and is provided "Right of Review" under §702.

That of the four cases on which the court of appeals based its decision, one was dismissed as untimely, two were not under §1552 and §1361 and of a Constitutional nature, and one was remanded, not applicable or analogous to this case.

2) THE FEDERAL QUESTIONS HEREIN HAVE BEEN DECIDED BELOW IN A WAY WHICH IS NOT IN ACCORD WITH THE APPLICABLE DECISIONS, FIRMLY ROOTED IN CASE LAW, OF THIS COURT.

The decision below directly conflicts with the principles in this Court's granting certiorari where court of appeals for two or more circuits, and where continuance of important federal questions were presented, compelled this Court to grant

certiorari, as in Donaldson, Jackson, Knetsch, Rogers, U.S. and Yellin, respectively, supra. (Citations omitted).

3) THE DECISION OF THE COURT OF APPEALS IN THIS CASE CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS ON THE SAME SUBJECT MATTER.

In holding that petitioner's suit is barred by the six-years statute of limitations, 28 U.S.C. 2401, the court of appeals has departed from the procedure aplied by other courts in similar fact situations, and for which reasons this Court was compelled to grant certiorari, supra.

This question has been addressed by at least five circuit courts of appeals, four courts of claims and four district courts, with the respective cases cited below, ruling the commencement of the statute of limitations begins with the final determination of the administrative agency, not with the initial military

actions complained of, herein, as in: Ballenger, Bard, Baxter, Bishop, Brin, Calhoun, Eicks, Hamlin, Hodges, Kaiser, Martin, Mulvaney, Powell, Quinn, Sherengos, Simmons, Uhley, Von Hoffburg, Walters, Wood and Yagjian, supra.(Citations omitted).

In Kaiser, the court found that an "interest of justice" outweighed any government argument of prejudice, and allowed the application to be heard before the court, ruling the government had waived any previous right to assert a defense of...by reason of the prior proceedings in the agency. In Kaiser, a problem Circa 1948, Correction Board's final action in 1979, and suit filed in 1981, the court denied defendant Secretary's and Board's motion to dismiss, a matter 33 years before suit.

In Yagjian, a problem Circa 1944-45, ABCMR denial in 1981 and suit filed in

1983, the court rendered judgment for Plaintiff, a matter 38 years before suit.

In Yee, supra, the court held wherein the military board failed to correct an injustice clearly documented, in failure to so do constitued arbitrary and capricious determination subject to reversal.

In Committee for GI Rights, supra, this court restated its general rule requiring exhaustion of military remedies as predicate to relief for members of armed forces in civil courts.

In Ogden, supra, this court affirmed the purpose of the Board of Correction of Military Records, was intended for relief from error or injustice at hands of armed forces, and was not intended to preclude judicial review.

4) THE DECISION OF THE COURT OF Appeals HAS SO FAR SANCTIONED A DEPARTURE FROM ACCEPTED JUDICIAL PROCEEDINGS BY THE DISTRICT COURT.

Petitioner contends that the misconduct of the ABCMR in 1981 and 1982, does give rise to his suit filed in 1983, and that there is no law to legally bar it.

It is clearly evident from the Cavalier treatment on the record, that neither the court of appeals nor the district court gave a thorough and good faith effort review of the petitioner's claims nor addressed his mandamus suit.

The standard of review of this case by the courts below was "erroneous" because facts exist and a substantial question of law is involved. Stauffer v. Laboratories, Inc. v. Federal Trade Commission, supra. The findings of the courts below may not be upheld if based upon an erroneous view of law. Ritter v. Morton, supra.

5) THE FEDERAL QUESTION HEREIN HAS NOT HERETOFORE BEEN DETERMINED BY THIS COURT.

Whether the decision of the courts below barring this suit on the six-years

statute of limitations is legal error and infringement of amendment and statutory provisions, since mandamus suit was filed in 1983 on ABCMR's own wrong committed in 1981-82 and "Right of Review" is provided under §702 permitted by §1552, supra?

This writ therefore raises a novel question of interpretation relating to the Exhaustion of Administrative Remedies Doctrine, conferred by §1552, and whether the court can bar suit contrary to §702 when the ABCMR commits its own wrong relative to §1552 and is timely challenged by military veteran under §1361?

Petitioner contends, that the barring of his suit by mere opinion and "rubber stamping" under the above circumstances, the courts below acted to legislate new law and over-ride existing law, for which neither has legal authority.

An Appellate court may enter judgment upon reversing a case if it finds the

facts are adequately developed in the record and it is able to direct judgment in favor of one party as a matter of law. Perkins v. Matthews, supra.

The availability of consistent relief through the federal courts from military correction boards' misconduct will be effectively denied veterans and amendment, statutory and regulatory provisions will be meaningless, unless strictly adhered to by the government and judiciary.

Therefore, certiorari is warranted in order that a conflict in law as determined by federal circuit courts may be resolved, and that under amendment rights petitioner and other veterans may receive treatment consistent with similar facts before other circuit and federal courts.

CONCLUSION

From the foregoing, it is clear that the courts below have decided an important question of federal law affecting millions

of veterans, which has not been, but should be settled by this Court.

Petitioner submits his military record amply demonstrates his patriotism, loyalty, and love of country, and remains confident the American system of justice will prevail and vindicate his position.

For the foregoing reasons, this Court should grant the writ of certiorari and sua sponte summarily reverse the judgment below, and grant petitioner the relief sought in his cross motion papers.

Respectfully submitted.

Clement J. Pacyna

CLEMENT J. PACYNA, Pro se
MSG, U.S. ARMY, RETIRED
1151 Wehrle Drive
Williamsville, New York 14221
Telephone (716) 632-4078

Dated: January 7, 1987

APPENDICES

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CLEMENT J. PACYNA,
Appellant,
v.
JOHN O. MARSH, JR., SECRETARY OF THE ARMY,
Appellee.

Appeal No.86-1488

JUDGMENT

ON APPEAL from the United States District Court for the Western District of New York in CASE NO(S). 83-205-C

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED: AFFIRMED

ENTERED BY ORDER OF THE COURT

/S/ FRANCIS X. GINDHART
FRANCIS X. GINDHART, Clerk

DATED NOV 13 1986

ISSUED AS A MANDATE: December 4, 1986

"Note: This opinion will not be published in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent. The decision will appear in tables published periodically."

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CLEMENT J. PACYNA, Appellant,	)	
v.	)	Appeal No.86-1488
JOHN O. MARSH, JR., SECRETARY OF THE ARMY, Appellee.	)	

DECIDED: November 13, 1986

Before RICH, BALDWIN, and NIES, Circut Judges

PER CURIAM.

DECISION

The March 7, 1984, Judgment of the United States District Court for the Western District of New York granted appellee Secretary of the Army summary judgment and dismissed as barred by the

statute of limitations Clement J. Pacyna's complaint seeking review of the decisions by the Army Board for Correction of Military Records (ABCMR). We affirm.

OPINION

The district court correctly held that appellant's claim accrued in 1952 when he was denied appointment as a warrant officer, see Bray v. United States, 785 F.2d 989 (Fed. Cir. 1986); Hurick v. Lehman, 782 F.2d 984 (Fed. Cir. 1986); Wilson v. United States, 231 Ct. Cl. 958 (1982); Bonen v. United States, 666 F.2d 536 (Ct. Cl. 1981), cert. denied, 456 U.S. 991 (1982), and thus the complaint is barred by 28 USC 2401, which imposes a six-year statute of limitations on claims against the United States.

Furthermore, resort to a correction board is a permissive rather than a mandatory step in the review process which neither suspends the statute of

limitations, Hurick, supra; Williams v. Secretary of the Navy, 787 F.2d 552, 562 n. 15 (Fed. Cir. 1986), nor obviously revives a cause of action previously barred by §2401. Appellant's argument that we must review the ABCMR's 1981 and 1982 decisions concerning a matter that accrued 31 years before this suit is contrary to law.

JUDGMENT IN A CIVIL CASE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

CLEMENT J. PACYNA

v. Docket No. Civ-83-205C

JOHN O. MARSH, JR.,
Secretary of the Army

NAME OF JUDGE: HONORABLE JOHN T. CURTIN

" ☐ Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict."

" ☒ Decision by Court. This action came to trial or hearing before the Court with the judge named above presiding. The issues have been tried or heard and a decision has been rendered."

IT IS ORDERED AND ADJUDGED

That defendant's motion for summary judgment is granted, and the complaint is dismissed.

/S/ JOHN K. ADAMS
JOHN K. ADAMS, Clerk

Buffalo, New York, DATE: March 8, 1984

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

MEMORANDUM DECISION
CIV-83-205C

CLEMENT J. PACYNA,

Plaintiff

v.

JOHN O. MARSH, JR.,
Secretary of the Army,

Defendant.

In this case, plaintiff seeks review of a final decision of the Secretary of the Army. Defendant moves to dismiss on the ground that plaintiff has failed to state a claim and, in the alternative, for summary judgment. The basis for these motions is lack of jurisdiction, statute of limitations, and laches.

The history of this litigation is a long one. It began in 1951, when plaintiff was serving as a master sergeant and applied for an appointment as a warrant officer in the Counter-intelligence Corps (CIC). Although he received approval from his local

commanders, on January 3 (sic), 1952, he was informed that his application did not receive final approval.

Plaintiff continued in military service until 1962, when he retired from the Army with the status of "retired reserve." Nothing occurred after that until February of 1979, when plaintiff made an application through the Freedom of Information Act and examined his personnel file.

On June 13, 1980, plaintiff filed an application with the Army Board for Correction of Military Records (ABCMR), seeking to have his 1952 promotion denial reversed and his records corrected accordingly. Plaintiff claims that his application was timely because it was filed within three years after he discovered the error in his record. In the fall of 1980, the ABCMR solicited and obtained an advisory opinion from the Office of the Judge Advocate General. A copy of the opinion, which re-

commended that plaintiff's claim be denied, was sent to him for his comment. Plaintiff responded in February of 1981.

After considering plaintiff's response, the Board concluded that plaintiff had not given any reason to explain why the action not to appoint him was illegal or in violation of regulations. The Board also held that his failure to timely file his application had made efforts by the Army to investigate his claim difficult. Because of his 28-year delay in challenging the decision made in 1952, only limited documentation is available. This decision was affirmed by the Secretary of the Army on June 7, 1982. Plaintiff's suit followed in February, 1983, with plaintiff claiming that failure to appoint him as a warrant officer was an abuse of discretion and a violation of his rights. He seeks an order of the court appointing him to the rank of warrant officer and retirement pay, including back

payment to the time of the initial denial.

Assuming for the moment that this court has jurisdiction, it is clear that plaintiff's claim is barred by the statute of limitations. 28 U.S.C. §2401(a) provides that a civil suit against the United States must be commenced within six years after the right of action first accrues. The statute may not be waived in actions against the United States. United States v. Kubrick, 444 U.S. 111 (1979). "(A) cause of action is deemed to have accrued when facts exist which enable one party to maintain an action against another." Konecny v. United States, 388 F.2d 59, 65 (8th Cir. 1967), quoting Great American Ins. Co. v. Louis Lesser Enterprises, Inc. 353 F.2d 997, 1001 (8th Cir. 1965).

The file in this case was complete in 1952, when plaintiff's application for promotion was rejected. Plaintiff argues that he was not able to obtain the facts

until he looked at his personnel file through a Freedom of Information Act Procedure in 1979, but there was no reason why he could not have reviewed his personnel records at an earlier date. Even if the statute of limitations was tolled during the period plaintiff remained on active duty, pursuant to the Soldiers and Sailors Civil Relief Act of 1940, 50 U.S. C. App. §501 et seq., his cause of action would have accrued upon his retirement in 1962.

Cases such as Kaiser v. Secretary of the Navy, 525 F.Supp 1226 (D. Col. 1981), cited by Plaintiff in support of his application, do not apply here. The statute of limitations did not apply in Kaiser, because the nature of the relief sought in that case was to correct a discharge from dishonorable to honorable. In that type of case, or cases in which the applicant seeks to expunge the judgment of a court martial,

the statute of limitations is not a bar. However, in cases like the present one where the relief sought is money, the statute of limitations is a bar if the case is untimely filed. In this case, the plaintiff wants his records corrected and, at the same time, he wants the government to increase his retirement pay.

Plaintiff cannot revive his claim by applying to the ABCMR in 1981 and claiming that the 1982 decision revived the jurisdictional statute. To do this would permit a plaintiff to have the power to avoid the jurisdictional bar every time he submitted an application which was considered by the Board. Thus, whether his claim accrued in 1952 or at the time of his retirement in 1962, the time to institute the suit has long passed.

Although the government vigorously urges that the court does not have jurisdiction under any theory, I find that there is

jurisdiction under 28 U.S.C. §1346. Plaintiff has waived his claim to any monetary award over $10,000.00.

Defendant's motion for summary judgment is granted, and the complaint is dismissed.

So ordered.

/S/ JOHN T. CURTIN
USDJ

Dated: March 7, 1984.

SUPREME COURT OF THE UNITED STATES

CLEMENT J. PACYNA v. JOHN O. MARSH, Jr., SECRETARY OF THE ARMY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 84-1706. Decided January 21, 1986

Per CURIAM.

Certiorari is granted. The judgment is vacated and the case is remanded for the Court of Appeals to transfer the case pursuant to 28 U.S.C. §1631 to the Court of Appeals for the Federal Circuit. See 28 U.S.C. §1295(a)(2).

It is so ordered.

D1

HEADQUARTERS FIRST ARMY
GOVERNORS ISLAND, NEW YORK 4, N.Y.

AHFAG-MP 201 Pacyna,Clement J. 22 JAN 1952

SUBJECT: Temporary Appointment as Warrant Officer

THRU: Commanding Officer
108th CIC Detachment
Boston Army Base
Boston, Massachusetts

TO: M/Sgt Clement J. Pacyna, RA20275571

1. Your application for temporary appointment as warrant officer was received at this headquarters and you were tentatively selected for appointment. Your application was forwarded to The Adjutant General in accordance with current directives.

2. The Adjutant General has informed this headquarters that your appointment as warrant officer, junior grade, Army of the United States in Counter-intelligence career warrant is not favorably considered.

BY COMMAND OF

D2

LIEUTENANT GENERAL CRITTENBERGER:

/S/JEROME L. BAES
JEROME L. BAES
1st Lieut, AGC
Asst Adj Gen

DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
WASHINGTON, D.C. 20310
20 Jul 1982

SFMR

Mr. Timothy R. Lovallo, Esq.
950 Ellicott Square Building
Buffalo, New York 14203

Dear Mr. Lovallo:

This is in reply to your letter of 7 July 1982 to the Deputy Assistant Secretary concerning the case of Master Sergeant Clement J. Pacyna, 106-05-7846, United States Army Retired.

Your vigorous dissent has been noted. However, all evidence currently of record clearly indicates that there was no material error or injustice in the Department's denial of Sergeant Pacyna's application for appointment as a warrant officer in 1952.

Please be advised that within the Department of Defense, the authority to effect the change you seek in Sergeant Pacyna's records can be exercised only through the

Board for Correction of Military Records. Accordingly, there is no higher administrative appeal within the Department of Defense.

Should you discover additional substantive evidence not previously submitted, you may ask for reconsideration of Sergeant Pacyna's case. Otherwise this letter constitutes final agency action on his request for correction of military records. However, if you desire additional review of the Board's actions, then you have the right to institute action in a Federal court of competent jurisdiction.

Sincerely,

/s/JOHN W. MATTHEWS
JOHN W. MATTHEWS
Executive Secretary
Board for Correction
of Military Records

Supreme Court, U.S.
FILED
APR 20 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1136

In the Supreme Court of the United States

OCTOBER TERM, 1986

CLEMENT J. PACYNA, PETITIONER

v.

JOHN O. MARSH, JR., SECRETARY OF THE ARMY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

MARY T. KOEHMSTEDT
Attorney

Department of Justice
Washington, D.C. 20530
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QUESTION PRESENTED

Under 28 U.S.C. 2401(a), civil actions against the United States must be commenced "within six years after the right of action first accrues." The question presented is whether petitioner's cause of action seeking money damages for the Army's allegedly wrongful denial of a promotion first accrued at the latest upon his discharge from the Army in 1962, or approximately 20 years later when the Army Board for the Correction of Military Records rejected his request for correction of his records to reflect receipt of the promotion.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1136

CLEMENT J. PACYNA, PETITIONER

v.

JOHN O. MARSH, JR., SECRETARY OF THE ARMY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A2-A4) is reported at 809 F.2d 792 (Table). The opinion of the district court (Pet. App. B2-B8) is reported at 617 F.Supp. 101.

JURISDICTION

The judgment of the court of appeals (Pet. App. A1) was entered on November 13, 1986. The petition for a writ of certiorari was filed on December 29, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. 2401(a) provides in pertinent part:

> Except as provided by the Contract Disputes Act of 1978, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues.

10 U.S.C. 1552 provides in pertinent part:

> (a) The Secretary of a military department, under procedures established by him and approved by the Secretary of Defense, and acting through boards of civilians of the executive part of that military department, may correct any military record of that department when he considers it necessary to correct an error or remove an injustice. Under procedures prescribed by him, the Secretary of Transportation may in the same manner correct any military record of the Coast Guard. Except when procured by fraud, a correction under this section is final and conclusive on all officers of the United States.
>
> (b) No correction may be made under subsection (a) unless the claimant or his heir or legal representative files a request therefor before October 26, 1961, or within three years after he discovers the error or injustice, whichever is later. However, a board established under subsection (a) may excuse a failure to file within three years after discovery if it finds it to be in the interest of justice.

STATEMENT

1. Petitioner is a former Army master sergeant who voluntarily retired from active duty in 1962 after completing 20 years of military service. In August 1951, while serving as a counter-intelligence agent in the Army, petitioner applied for a promotion to the position of warrant officer in the Counter-Intelligence Corps (CIC). His superior officers, as well as a board of officers, recommended his selection, but the CIC ultimately declined to approve the appointment because petitioner did not meet the educational requirement for the position.[1] On January 22, 1952,

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[1]Under Army and CIC regulations in force at the time, an applicant for warrant officer was required to have completed two years of college or the equivalent (C.A. App. 149; see also *id.* at 144-145). Petitioner left

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petitioner's commanding officer informed him that his application had not been approved (Pet. App. D1). Petitioner took no action to challenge this decision at any time between 1952 and his voluntary retirement from the Army ten years later.

Seventeen years after his retirement, in February 1979, petitioner requested and obtained his military personnel records from the Department of the Army. The following year, on June 13, 1980, he applied to the Army Board for the Correction of Military Records (ABCMR or Board) seeking correction of his records to reflect a promotion to warrant officer retroactive to 1952. Pet. App. B3. The Board solicited and obtained an advisory opinion from the Judge Advocate General of the Army concerning petitioner's request (*ibid.*). That opinion, which recommended that petitioner's request be denied, was sent to petitioner for his comments (*id.* at B3-B4).

On February 25, 1981, following a thorough analysis of petitioner's application, his response to the Judge Advocate General's opinion, his military records and other materials, the Board concluded that petitioner had failed to furnish any material evidence indicating that the 1952 decision not to promote him to warrant officer was in any way unlawful or unjust. The Board also concluded that petitioner's 28-year delay in challenging that decision made it difficult to obtain evidence concerning his claim (Pet. App. B4). Accordingly, the Board denied petitioner's application and notified him of its decision. C.A. App. 40-43. Petitioner

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high school in the ninth grade and later obtained a high school equivalency certificate (*id.* at 119). Although an applicant could request a waiver of this requirement (*id.* at 149), petitioner's records do not indicate that he made such a request (see Pet. 10). Moreover, it was determined at the time that petitioner's record would not have justified the grant of an educational waiver in any event (C.A. App. 138; see Pet. 20).

sought reconsideration of the Board's decision on four separate occasions, and each of these requests was denied (*id.* at 202).

2. On February 23, 1983, petitioner commenced this action in the United States District Court for the Western District of New York. He alleged that the district court's jurisdiction was based on the Tucker Act, 28 U.S.C. 1346, and the mandamus statute, 28 U.S.C. 1361 (C.A. App. 2). He claimed that the Board had abused its discretion in denying his application and sought an order correcting his record to reflect a promotion to warrant officer in 1952. He also sought an award of back pay retroactive to 1952, including increased retirement pay (*id.* at 5; Pet. App. B4-B5). Petitioner waived any claim to money damages in excess of $10,000 in order to preserve jurisdiction in the district court. Pet. App. B8; see 28 U.S.C. 1346(a)(2) (granting the district courts jurisdiction, concurrent with the Claims Court, of non-tort claims against the United States "not exceeding $10,000 in amount").

The district court granted the government's motion for summary judgment and dismissed petitioner's complaint (Pet. App. B1-B8). It held that petitioner's claim had accrued, at the latest, upon his retirement from the Army in 1962, and hence that his claim was barred by 28 U.S.C. 2401(a), which establishes a six-year statute of limitations for civil actions against the United States (Pet. App. B5-B7). The court rejected petitioner's argument that his money claim had been "revived" by the ABCMR's 1982 decision, pointing out that acceptance of this argument "would permit a plaintiff * * * to avoid the jurisdictional bar every time he submitted an application which was considered by the Board" (*id.* at B7). The court emphasized that petitioner was not seeking "to correct a discharge from dishonorable to honorable," "to expunge the judgment of a court martial," or otherwise merely to clear his name, but

rather was seeking money damages (*id.* at B6). "[I]n cases like the present one where the relief sought is money," the court concluded, "the statute of limitations is a bar if the case is untimely filed" (*id.* at B7).

The United States Court of Appeals for the Second Circuit affirmed in an unpublished judgment order. This Court granted certiorari, vacated the judgment, and remanded the case to the Second Circuit with directions to transfer it to the Federal Circuit pursuant to 28 U.S.C. 1631. *Pacyna* v. *Marsh*, No. 84-1706 (Jan. 21, 1986). The Court based its order on 28 U.S.C. 1295(a)(2), which grants the Federal Circuit exclusive jurisdiction over appeals of suits brought under the Tucker Act. See 84-1706 U.S. Br. 4-5.

The Federal Circuit unanimously affirmed the district court in an unpublished per curiam opinion (Pet. App. A2-A4). It held that petitioner's claim had accrued in 1952 when he was denied appointment as a warrant officer and, therefore, that his complaint was barred by the six-year statute of limitations in 28 U.S.C. 2401(a) (Pet. App. A3). The court further held that resort to a Correction Board does not revive a claim for money damages on which the limitations period has already run (*id.* at A3-A4).

ARGUMENT

The decision of the Federal Circuit is correct and accords with an unbroken line of opinions spanning 25 years. It does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. Petitioner challenges a 35-year old decision by the Army denying his application for promotion to the position of warrant officer. As this Court has recognized, a plaintiff's cause of action generally accrues for statute-of-limitations purposes "when there is a breach of duty owed the plaintiff." *Unexcelled Chemical Corp.* v. *United States*, 345 U.S. 59, 65 (1953). Petitioner was advised in January 1952

that he would not be promoted to the position of warrant officer; his cause of action therefore accrued at that time or, at the latest, upon his discharge from the Army in 1962. See *Walters* v. *Secretary of Defense*, 725 F.2d 107, 114-115 (D.C.Cir. 1983); *Nichols* v. *Hughes*, 721 F.2d. 657, 659-660 (9th Cir. 1983); *Ballenger* v. *Marsh*, 708 F.2d 349, 350 (8th Cir. 1983); *Cowhig* v. *Marsh*, 693 F.2d 234, 235 (1st Cir. 1982), cert. denied, 460 U.S. 1092 (1983); *Boruski* v. *United States Government*, 493 F.2d 301, 304 n.5 (2d Cir.) (per curiam), appeal dismissed, 419 U.S. 808 (1974), cert. denied, 421 U.S. 1013 (1975); *Mathis* v. *United States*, 391 F.2d 938, 938-939 (1968) (per curiam), aff'd on reh'g, 421 F.2d 703 (Ct. Cl. 1970). Since an action against the United States must be filed "within six years after the right of action first accrues" (28 U.S.C. 2401(a)), and since petitioner plainly failed to satisfy this requirement, the courts below correctly concluded that petitioner's action was time-barred.[2]

2. Petitioner asserts (Pet. 26-27) that the statute of limitations did not begin to run until the Correction Board issued its decision in 1981. However, in *Soriano* v. *United*

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[2]Petitioner contends (Pet. 9-11) that his efforts to obtain information about the reasons he was not promoted were thwarted by his superiors and that he was not able to ascertain the facts until he obtained copies of documents from his personnel file through the Freedom of Information Act in 1979. The district court found (Pet. App. B6) that there was no reason petitioner could not have reviewed his personnel records prior to 1979. This factual finding, which was implicitly affirmed by the court of appeals, does not merit review in this Court. *Tony & Susan Alamo Foundation* v. *Secretary of Labor*, 471 U.S. 290, 299 (1985); *Branti* v. *Finkel*, 445 U.S. 507, 512 n.6 (1980). In any event, petitioner's contention is baseless. Army regulations in force during the period in question enabled servicemen to review their own personnel files upon request. See Army Reg. 345-20, ¶ 15(e)(3) (Mar. 9, 1951); Army Reg. 345-20, ¶ 15(e) (Mar. 9, 1956). Furthermore, the Freedom of Information Act was passed in 1966. Thus, even if that statute was the only means available to petitioner to obtain his military records, there is no reason why he could not have done so 13 years earlier than he did.

States, 352 U.S. 270 (1957), this Court rejected a substantially similar argument, holding that a money claim that is ripe for judicial resolution must be filed " 'within six years after such claim *first* accrues,' " and that the six-year statute cannot be extended by the pursuit of various administrative remedies. 352 U.S. at 273 (emphasis added) (quoting 28 U.S.C. 2501). Construing 28 U.S.C. 2501, a limitations provision governing actions in the Claims Court which is almost identical to Section 2401, the Court concluded that "to say that the exhaustion of administrative remedies in such case is a prerequisite to the jurisdiction of the Court of Claims would but engraft [another] disability upon the statute and thus frustrate the purpose of Congress. Furthermore, it would be a limitless extension of the period of limitation that Congress expressly provided for the prosecution of claims against the Government in the Court of Claims. This we cannot do." 352 U.S. at 275 (original quotation marks omitted).

Petitioner's argument fails for the same reason. Under his theory, a person seeking to challenge a discharge or nonpromotion could revive a stale claim for money damages by the simple expedient of applying first to the Correction Board, and then, following a denial of his claim by the Board, bringing a Tucker Act suit. In that way, the statute of limitations could effectively be eliminated as a bar to ancient claims for money damages.[3] Over the past 25 years,

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[3]In *Crown Coat Front Co.* v. *United States*, 386 U.S. 503, 511 (1967), this Court held that, in a Tucker Act suit brought on a contract which contained a provision mandating equitable administrative adjustment for any changes in the contract, the cause of action did not accrue within the meaning of 28 U.S.C. 2401(a) until "the completion of the administrative proceedings contemplated and required by the provisions of the contract." In *Crown Coat*, however, "the contractor's claim was subject only to administrative, not judicial, determination in the first instance, with the right to resort to the courts only upon the making of that administrative determination" (386 U.S. at 511-512). The Court

the Federal Circuit and its predecessor, the Court of Claims, have repeatedly rejected this precise argument, and this Court has consistently declined to review those decisions. See *Bonen* v. *United States*, 666 F.2d 536, 539 (Ct. Cl. 1981), cert. denied, 456 U.S. 991 (1982); *Ramsey* v. *United States*, 215 Ct. Cl. 1042 (1978), cert. denied, 439 U.S. 1068 (1979); *Bruno* v. *United States*, 556 F.2d 1104, 1106 (Ct. Cl. 1977); *Brundage* v. *United States*, 504 F.2d 1382, 1385 (Ct. Cl. 1974), cert. denied, 421 U.S. 998 (1975); *Mathis* v. *United States, supra; Friedman* v. *United States*, 310 F.2d 381, 396-403 (Ct. Cl. 1962), cert. denied, 373 U.S. 932 (1963). Petitioner's contention that there is a conflict among the courts of appeals on this issue is simply incorrect. None of the appellate decisions cited by petitioner (Pet. 29) is even remotely on point.

3. Petitioner next argues (Pet. 26) that he is entitled to judicial review of the Correction Board decision itself under the Administrative Procedure Act (APA), 5 U.S.C. (Supp. III) 702. As this Court has observed, "Board decisions are subject to judicial review and can be set aside if they are arbitrary, capricious, or not based on substantial evidence." *Chappell* v. *Wallace*, 462 U.S. 296, 303 (1983). Four circuits in fact have recently held that Board decisions are independently reviewable within six years even if the statute of limitations has passed on the underlying action considered by the Board. *Blassingame* v. *Secretary of Navy*, 811

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expressly distinguished *Soriano* v. *United States, supra*, and *Unexcelled Chemical Corp.* v. *United States, supra*, on the grounds that in the latter two cases the administrative action was not a prerequisite to suit (386 U.S. at 519). Similarly, the Federal Circuit does not require a plaintiff to apply to the Correction Board before seeking money damages in court under the Tucker Act on a claim of wrongful discharge or nonpromotion. See, *e.g.*, *Heisig* v. *United States*, 719 F.2d 1153, 1155 (Fed. Cir. 1983); *Eurell* v. *United States*, 566 F.2d 1146, 1147-1148 (Ct. Cl. 1977). Thus, petitioner's cause of action for money damages properly accrued at the time of the allegedly wrongful nonpromotion.

F.2d 65 (2d Cir. 1987); *Smith* v. *Marsh*, 787 F.2d 510 (10th Cir. 1986); *Geyen* v. *Marsh*, 775 F.2d 1303 (5th Cir. 1985); *Dougherty* v. *United States Navy Bd. for Correction of Naval Records*, 784 F.2d 499 (3d Cir. 1986). None of these cases, however, involved a claim for money damages under the Tucker Act. Indeed, none of these cases could possibly have involved a Tucker Act claim, since, if they had involved such a claim, the district court decisions would have been appealable, under 28 U.S.C. 1295(a)(2), to the Federal Circuit rather than to the regional courts of appeals. Because petitioner brought the instant action to recover money damages under the Tucker Act, the cases just cited are distinguishable from this one. See, *e.g.*, *Blassingame*, 811 F.2d at 68 (noting that the plaintiff "relinquished his demand for monetary damages" and that he sought "only the equitable relief of an upgrade of his discharge and no money damages"); *Dougherty*, 784 F.2d at 502 (noting that "[t]he instant case is not a pay case" and that "[t]he equitable considerations governing a corrective action are quite different than those governing a monetary action").

The reason for the distinction between cases involving monetary and nonmonetary claims lies in the judicial review provision of the Administrative Procedure Act, 5 U.S.C. (Supp. III) 702. See *Dougherty*, 784 F.2d at 502 n.10. That provision, upon which petitioner relies (Pet. 16, 18, 26-27), generally provides a cause of action for judicial review of final agency action. Section 702 explicitly states, however, that an action may be brought thereunder only if it is an action "seeking relief other than money damages." Because Section 702 does not waive sovereign immunity for actions seeking money damages, petitioner's cause of action for money damages necessarily accrued at the time of his

allegedly wrongful nonpromotion in 1952, or, at the latest, upon his retirement from the Army in 1962 (Pet. App. B6). Because petitioner failed to bring his suit within six years of either of those dates, his action is barred by 28 U.S.C. 2401(a).

This distinction between monetary and nonmonetary claims surely comports with common sense. Petitioner did not seek equitable relief in an effort to "clear his name," but sought money damages going back to 1952. As this Court noted in *United States* v. *Testan*, 424 U.S. 392, 403 (1976), "[t]here is a difference between prospective reclassification, on the one hand, and retroactive reclassification resulting in money damages, on the other." The APA cannot revive petitioner's stale claim for money damages.

4. Although petitioner explicitly predicated his complaint on the Tucker Act (C.A. App. 2), he contends (Pet. 31-32) that he is seeking not only money damages, but also a writ of mandamus under 28 U.S.C. 1361 to review the Board's allegedly wrongful failure to "correct" his record to reflect the promotion. He accordingly argues that judicial review would be appropriate. But it is well settled that a plaintiff with an admitted monetary objective cannot evade the Tucker Act simply by citing other jurisdictional provisions, such as 28 U.S.C. 1361. See, *e.g.*, *Matthews* v. *United States*, 810 F.2d 109, 113 (6th Cir. 1987); *Keller* v. *MSPB*, 679 F.2d 220 (11th Cir. 1982) (per curiam); *Williams* v. *Secretary of Navy*, 787 F.2d 552, 557-558 (Fed. Cir. 1986); *Maier* v. *Orr*, 754 F.2d 973, 982 (Fed. Cir. 1985); *Denton* v. *Schlesinger*, 605 F.2d 484, 486-487 (9th Cir. 1979); *Cook* v. *Arentzen*, 582 F.2d 870, 878 (4th Cir. 1978); *Mathis* v. *Laird*, 483 F.2d 943 (9th Cir. 1973) (per curiam);

Carter v. *Seamans*, 411 F.2d 767, 771 (5th Cir. 1969), cert. denied, 397 U.S. 941 (1970). Petitioner specifically sought back pay and increased retirement benefits stemming from his allegedly wrongful nonpromotion in 1952. He cannot obtain judicial consideration of that claim indirectly in the guise of an action to compel the Correction Board to grant the very monetary relief that he is barred by the statute of limitations from seeking directly. See *United States* v. *Testan*, 424 U.S. at 404.

Even where a plaintiff has not explicitly predicated jurisdiction on the Tucker Act, a self-styled claim for equitable relief may be time-barred by Section 2401(a) if the cause of action accrued more than six years earlier and the relief requested would be tantamount to a monetary award. As the Sixth Circuit has stated (*Tennessee ex rel. Leech* v. *Dole*, 749 F.2d 331, 336 (1984), cert. denied, 472 U.S. 1018 (1985)), "a claimant may not avoid the exclusive jurisdiction of the Court of Claims merely by framing a complaint to seek nonmonetary relief when the result would be the equivalent of obtaining money damages." See also *Matthews* v. *United States*, 810 F.2d at 113. In circumstances where it is unclear whether a plaintiff purporting to seek only equitable relief is actually bringing a disguised Tucker Act claim, the ambiguity may be resolved by requiring him explicitly to waive any claim to money damages. See, *e.g.*, *Blassingame*, 811 F.2d at 68. As we have noted, there was no such ambiguity in the instant case, since petitioner expressly based jurisdiction on the Tucker Act and waived money damages only in excess of $10,000 (Pet. App. B8).[4]

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[4]Where a plaintiff has waived all monetary claims in order to secure jurisdiction in a regional court of appeals, of course, he cannot subsequently reverse himself and seek money damages in the district court or in the Claims Court. Thus, even if a plaintiff were successful in getting the regional circuit to overturn the action of the Correction Board, he could not use that judgment as the basis for a new cause of action for

In sum, it is one thing for a plaintiff to seek review of a Correction Board decision to try to correct his military record or clear his name long after the events in question occurred. Congress has provided a mechanism by which the Correction Board may waive its own statute of limitations where it is "in the interests of justice" to do so (10 U.S.C. 1552(b)). But it is quite another thing for that plaintiff to sue for monetary damages, whether directly or indirectly, after the statute of limitations has run on his claim. *United States* v. *Testan*, 424 U.S. at 403. Congress has not provided a waiver provision for such suits, and "this Court has long decided that limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied." *Soriano* v. *United States*, 352 U.S. at 276.

5. A final factor counseling against a grant of certiorari in this case is the insubstantial nature of petitioner's underlying claim. He has never articulated any reason why he was entitled to a promotion in 1952 despite his lack of educational qualifications for the position of warrant officer. The Correction Board correctly noted that petitioner had "failed to submit sufficient relevant evidence to demonstrate the existence of probable material error or injustice" in the decision not to promote him. C.A. App. 43. As the district court pointed out, moreover, "[b]ecause of [petitioner's] 28-year delay in challenging the decision made in 1952, only limited documentation is [now] available" (Pet.

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money damages if the allegedly wrongful discharge or nonpromotion occurred more than six years previously. First, he would be bound by his prior waiver of monetary relief. Second, APA review of a Correction Board decision would not change the fact that any suit for monetary damages under the Tucker Act accrues on the date of the underlying discharge or nonpromotion. A suit for monetary damages based on a discharge or nonpromotion more than six years old would therefore be barred regardless of any subsequent decision granting the plaintiff an upgraded discharge or similar equitable relief.

App. B4). Thus, whatever action this Court took on the statute-of-limitations issue, the end result of this litigation would be the same.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

MARY T. KOEHMSTEDT
Attorney

APRIL 1987

Supreme Court, U.S.
FILED
MAY 4 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1136

In THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

CLEMENT J. PACYNA, PETITIONER

v.

JOHN O. MARSH, Jr., SECRETARY OF THE ARMY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE PETITIONER IN REPLY

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A2-A4) is reported at 809 F.2d 792. The opinion of the district court (Pet. App. B2-B8) is reported at 617 F. Supp. 101.

JURISDICTION

The judgment of the Court of Appeals (Pet. App. A1) was entered on November 13, 1986. The petition for a writ of certio-

rari was filed on December 29, 1986. The brief in opposition was filed on April 20, 1987 and served on Petitioner on April 23, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

ARGUMENT

POINT I

RESPONDENT'S ARGUMENT THAT THERE IS NO CONFLICT AMONG OUR CIRCUIT COURTS IS SIMPLY INCORRECT.

The Respondent's opening argument cited (Resp. 5) that the decision of the Federal Circuit is correct and does not conflict with any decisions of this Court or of any other court of appeals is simply incorrect and contrary to the record.

In order to obtain a third extension of time, which was approved, the Respondent's attorney filed with Clerk of this Court a letter, dated March 30, 1987, which is Appendix A herewith, in which the reasons given in part are as follows:

"This case presents complex issues that are of concern to all branches of

the military. It also presents an apparent conflict among THE circuit courts."

The Petitioner's writ contains various and numerous cases supporting that there is widespread conflict among our circuit or federal courts on the subject matter, particularly requiring exhaustion of military remedies as predicate for members of armed forces in civil courts.

POINT II

THE QUESTION PRESENTED BY RESPONDENT IS MISREPRESENTATIVE OF THE CASE.(Resp.(i)).

Petitioner calls such action manipulative and are the desperate acts of the government which will do anything to win against a veteran(s).

The issue presented in this case is not whether the monetary cause of action accrued at the latest in 1962 or 1982 as Respondent contends, but rather whether the district court erred in failing to address and barring action accrued in 1982 with suit filed in 1983 challenging

the Respondent's arbitrary and capricious and or misrepresentative final agency denial (Pet. App. E1) conferred by 10 U.S.C. §1552 and 28 U.S.C. §1361 and "right of Review" under 5 U.S.C. §702 (Pet. writ), which is first and foremost.

Thusly, there can be no bar to this §1361 and §1552 suit by the six-year statute of limitations under §2401(a) on a cause of action tolling until 1988 under existing law. As such Petitioner's or veteran's case has merit in fact and law.

POINT III

THE RESPONDENT CONTINUES TO MISREPRESENT THE CASE OTHERWISE HIS DEFENSE COLLAPSES.

Although the record and Petitioner's writ, supported by substantial evidence, clearly shows that his suit is bifurcated primarily as a nonmonetary claim under §1361, and a monetary claim under §1346, the Respondent's argument is cleverly couched by misrepresentation to mislead

this Court into believing that this is soley a monetary suit on a claim accrued in 1952 or at the latest in 1962 upon Petitioner's retirement (not discharge), and thusly barred by the six-years statute of limitations under §2401(a).

For example, the Respondent argues (Resp. 3) that "Petitioner asserts that the statute of limitations did not begin to run until the Correction Board issued its decision in 1981" and that "this Court rejected a substantially similar argument, holding that a money claim that is ripe for judicial resolution must be filed "'within six years after such claim first accrues'" and that the six-year statute cannot be extended by the pursuit of various administrative remedies", but he evades that petitioner's suit is primarily based on a nonmonetary claim (Pet. Appendix B herewith) of the alleged arbitrary and capricious depriva-

tion of the right, conferred by the Act of October 25, 1951 under 10 U.S.C. §1552 as well as 28 U.S.C. §1361, to the Respondent's action in 1981 and 1982, necessary to correct an error or remove an injustice, and by "Right of Review" by the court by suit filed in 1983 seeking relief other than money damages provided by 10 U.S.C. §702. (See Gordon v. United States, Ct. Cl., 121 F. Supp. 625; Uhley v. United States, Ct. Cl., 121 F. Supp. 674; Hodges v. Callaway, 5th Cir., 499 F.2d 417; Baxter v. Claytor, USCA D.C. Cir., 652 F.2d 181; and Moen v. United States, Ct. Cl., 121 F. Supp 677.

In the above cases, the courts Reversed and Remanded, respectively. In Moen, the court overruled motion to dismiss. In Uhley, the court denied Defendant's motion to dismiss, finding:

"We think it is clear, under the facts and circumstances of this case, that Plaintiff's claim did not first accrue

on December 24, 1945, as defendant contends.

POINT IV

RESPONDENT'S CASE LAW PRESENTED MISREPRESENTS THE CASE.

As aforementioned, the Respondent is attempting to cloud the nonmonetary claim by focusing only on the monetary claim to get this Court to favor him, erroneously.

Therefore, the case law presented by Respondent is not applicable to the Petitioner's primary claim of the Respondent's wrongful denial of his application in 1981 and 1982, and is contrary to cases presented by Petitioner in his writ and information herein.

As such, the Respondent's assertion that "None of the appellate decisions cited by petitioner(Pet.29) is even remotely on point"(Resp.8) is simply incorrect.

POINT V

THE RESPONDENT'S ARGUMENT THAT EXHAUSTION OF REMEDIES WOULD BE A DISABILITY IS SELF-SERVING.

The Respondent's argument that the exhaustion of administrative remedies in such case would engraft (another) disability upon §2401(a) (Resp. 7) is contrary to statute and case law.

In Ogden v. Zuckert, D.C. Cir., 298 F.2d 312 (Pet. 30), the court affirmed the purpose of the Board of Correction of Military Records, provided by §1552, was intended for relief from error or injustice at hands of armed forces and was not intended to preclude judicial review.

As aforementioned, Respondent has presented no opposition (statutes) to Petitioner's primary nonmonetary claim, as he has no defense against same.

POINT VI

RESPONDENT EXPRESSED WILLINGNESS TO CORRECT PETITIONER'S RECORD BUT ACTED ON A DECEPTIVE LEGAL OPINION OF THE JUDGE ADVOCATE GENERAL (TJAG) (Resp. 3).

In correspondence, dated 3 Oct 80, from Respondent acting through the ABCMR

to TJAG, it was requested that the case be reviewed for legal deficiency. Futher, "If it is determined that the proceedings are legally deficient, it is requested that appropriate administrative action be taken." TJAG informed that no legal error was found, which is contrary to the record (Pet. 18-21) and is deceptive. The record clearly shows that Petitioner's Constitutional, statutory and regulatory rights were prevalently violated. The correspondence is Appendix B herewith.

POINT VII

RESPONDENT'S ARGUMENT THAT THE DISTINCTION BETWEEN MONETARY AND NONMONETARY CLAIM SURELY COMPORTS WITH COMMON SENSE IS CORRECT.

The Respondent's statement that "Petitioner did not seek equitable relief in an effort to "clear his name" (Resp. 10), is simply incorrect and contrary to his application to the ABCMR on record.

Petitioner's application foremost requested relief from error or injustice

and lastly right of compensation.

Therefore, upon determining that the Respondent violated Petitioner's Constitutional, statutory and regulatory rights in denying him promotion because of the Army's violations of its own regulations, and reverses the decision of the court below on Petitioner's nonmonetary claim, this Court can and should set aside or allow Petitioner to amend his complaint not seeking monetary claim in the court, and direct the Respondent to correct Petitioner's record to show appointment to warrant officer [1] retroactive to 1952 and substantive right to compensation founded upon the Act of Congress, 10 U.S.C. §1552, which authorizes boards for correction of military records to

1. The Career Compensation Act of 1949 authorizes four warrant officer pay grades: W-1 (junior grade and W-2, W-3 and W-4 (Chief). Based on his exemplary record, Petitioner would have retired at the minimum W-2 or maximum W-4 pay grade.

award back pay. (See Sanders v. United States, 594 F.2d 804, 808-11 n. 11, 219 Ct. Cl. 285 (1979), cited with approval in Chappell v. Wallace, 462 U.S. 296, 103 S.Ct. 2362, 76 L.Ed.2d 586.

POINT VIII

RESPONDENT CONTINUES TO MISREPRESENT THE FACTS.

Although alleged Army violations in 1952 and Respondent's wrongful denial in 1982 were not a ground in his motion to dismiss (Pet. App. B2), which renders the matter moot since the only issue involved is district court's erroneous decision barring petitioner's first and foremost nonmonetary claim, the Respondent nevertheless continues to misrepresent the facts, contrary to the record.

For example Respondent states:

1) that Petitioner challenges a 35-year old army decision (Resp.5), when in fact suit is against Respondent's arbitrary and capricious and or misrepresentative

final action in 1982 (Pet. 18);

2) that Petitioner was advised in 1952 of denial of promotion (Resp. 5), but evaded that notification (Pet. App. D1) was WITHOUT REQUIRED Constitutional, statutory and regulatory reasons given for denial and that the Army acted on an incomplete application violative of regulations (Pet. 18-21);

3) that only limited documentation is (now) available (Resp. 12), when all papers are available except a regulatory required educational waiver and Commander's recommendation thereof on the waiver containing Petitioner's prerequisites, but was lost by the Army and resulted in the Army ruling on an incomplete application (Pet. 18-21);

4) that 2-years college was required (Resp. Note 1), but withheld that waivers of any prerequisites were permitted (Pet.5).

5) that Petitioner has never given any

reasons for entitlement of promotion in 1952 (Resp.12), when his prerequisites were on the requested waiver and Commander's comment required (Pet.5,6), which as aforementioned the Army lost, or are contained on the record on appeal certified by Respondent, which shows Petitioner's demonstrated ability, high mental capacity or outstanding performace of duty to a degree which compensated for lack of prerequisites for which educational waiver was requested. Further shows, that Petitioner had a superior efficiency rating for ten (10) years prior service; awarded a seldom given or heard of Certificate of Achievement from CIC; an Area I (IQ) of 127 (110 is minimum required for Commissioned and Warrant Officer); leadership ability in Combat and overseas and stateside assignments; numerous decorations and awards for combat and service; and an exemplary service record both in combat and as a

counterintelligence agent, as attested to by Respondent; and

6) that the district court opinion is relied upon by Respondent (Resp. 4,5,12), but withheld that the opinion for the most part is erroneous (Pet. 22-25) and is the Respondent's, as it was taken verbatim from his Memorandum of Law to dismiss. The district court merely framed its decision (Pet. App. B2-B8) almost entirely on the Respondent's argument, without addressing Petitioner's primary nonmonetary or §1361 claim provided by law aforementioned. In fact or effect Respondent is quoting back his own argument assumed to be the district court's.

CONCLUSION

For the reasons stated above and in Petitioner's writ, the court of appeals erred in its decision and case law relied upon in affirming the decision of the district court barring suit on limitations.

Neither court addressed Petitioner's primary §1361 and §1552 suit. Moreover, both courts blatantly denied review without statutory power and contrary to 5 U.S.C. §702 which provides for "right of review", affecting millions of other veterans in similar fact situations.

The Respondent's argument should be denied, the petition for a writ of certiorari should be granted, and the Court as an appellate court can and should summarily sua sponte reverse the judgment below and grant Petitioner the relief sought in the interest of justice.

Respectfully submitted.

Clement J. Pacyna

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Dated: April 28, 1987

APPENDIX

U.S. Department of Justice
Office of the Solicitor General
Washington, D.C. 20530

March 30, 1987

Honorable Joseph F. Spaniol, Jr.
Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: Pacyna v. Marsh, No. 86-1136

Dear Mr. Spaniol:

The petition for a writ of certiorari in this case was filed as of December 28, 1986, and was served on the government on January 13, 1987; after two extensions, the government's response is now due on April 4, 1987. We respectfully request, under Rule 29.3 of the Rules of this Court, a further extension of time to and including April 20, 1987, within which to file the government's response.

This case presents complex issues that are of concern to all branches of the military. It also presents an apparent conflict among the circuit courts. Our

consultations with the military services about the position the government should take in response to the instant petition have taken longer than anticipated but are now reaching their close. An additional extension of time is needed to draft and arrange for the printing of a response reflecting these views.

Sincerely,

T/ Charles Fried
Solicitor General

cc: Clement J. Pacyna
1151 Wehrle Drive
Williamsville, New York 14221

SFMR-PACYNA, CLEMENT J. 106-05-7846
(26 Aug 80)
SUBJECT: Request for Correction of
Military Records

TO DAJA-ZX
Military Pers Law Term
2E444

FROM OSA, ABCMR
1E517

DATE 3 Oct 80 Cmt 3
Mr. Gibson/54539

Reference is made to the inclosed application for correction of military records in the case of the above-named individual, particularly the applicant's contention that the action taken by the Department to disapprove his application for appointment as a Warrant Officer was legally deficient.

It is requested that the attached case be reviewed. If it is determined that the proceedings are legally deficient, it is requested that appropriate administrative action be taken. If the proceedings are deemed legally sufficient, it is further requested that the case be returned to this office with your comment

and legal opinion regarding the legal sufficiency of the proceedings.

S/ (illegible signature)
T/ John W. Matthews
for/Executive Secretary

3 Incl
1. DD FM 149 w/incl
2. OMPF
3. CMT 2 fr MILPERCEN dtd 10 sep 80

Supreme Court, U.S.
FILED
JUN 2 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1136

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

CLEMENT J. PACYNA, PETITIONER

v.

JOHN O. MARSH, Jr., SECRETARY OF THE ARMY

ON PETITION FOR REHEARING OF AN ORDER DENYING PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Is the decision of the court below barring suit on limitations, in which suit mandamus is part of an important ground for relief and a clear right to issue tolling until 1988 for resubmittance, supported by substantial evidence, not an adverse affect or aggrievement within relevant statute, and not otherwise an infringement on Amendments I, V and XIV ?

CERTIFICATION

The petitioner hereby certifies that this petition for rehearing is restrictive to intervening circumstances of substantial or controlling effect or to other substantial grounds not previously presented, and that it is presented in good faith and not for delay, pursuant to Rule 51 of this Court.

S/Clement J. Pacyna
CLEMENT J. PACYNA
Petitioner-Appellant, Pro se

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A2-A4) is reported at 809 F.2d 792. The opinion of the district court (Pet. App. B2-B8) is reported at 617 F. Supp. 101.

JURISDICTION

The judgment of the court of appeals (Pet. App. A1) was entered on November 13, 1986. The judgment of the district court

(Pet. App. B1) was entered March 3, 1984. The final decision of the Army Board for Correction of Military Records (ABCMR) (Pet. App. E) was entered July 20, 1982. The letter/order of this Court denying petition for a writ of certiorari, the appendix annexed hereto, was entered on May 18, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The petitioner filed a grievance with the ABCMR on June 13, 1980, seeking correction of an error or injustice in his army record pursuant to 10 U.S.C. §1552. Petitioner claimed primarily that a promotion denied him was the result of the army's violations of its own regulations, and therefore should be reversed with compensatory relief retroactive to date of infraction. The ABCMR denied the application on the ground that petitioner failed to submit sufficient relevant evidence

to demonstrate the existence of probable material error or injustice. The ABCMR decision caused petitioner to suffer a wrong, clearly evidenced on the face of the record (Pet. App. D). Suit was filed in the district court on February 23, 1983. Petitioner's suit was predicated upon not one but rather two jurisdictional legs upon which this action stands: (1) 28 U.S.C. §1346 for monetary relief and (2) 10 U.S.C. §1361 for non-monetary or mandamus relief created by 10 U.S.C. §1552.

The court of appeals affirmed the district court's decision that suit was barred by the six-year statute of limitations under 28 U.S.C. §2401(a), finding that petitioner's argument that the court must review the ABCMR decision is contrary to law.

ARGUMENT

POINT I

THE COURT BELOW FAILED TO CONSIDER IMPORTANT GROUNDS FOR RELIEF.

Petitioner's non-monetary claim challenging the ABCMR's own wrongful decision on July 20, 1982, pursuant to §1552 tolls under §2401(a). Therefore, the court overlooked the fact that petitioner can resubmit his mandamus suit until July 20, 1988.

However, the court could resolve the mandamus part of his suit without further burdening the court, since the matter is already and has been before the court since suit was filed in 1983 or almost four (4) years ago.

Petitioner vehemently contends, that the court below failed to address his non-monetary claim. The decision of the court barring petitioner's mandamus claim by rumaging outside the rules under the ruse of the statute of limitations is simply erroneous, unsupported by any statute, and contrary to 10 U.S.C. §702, which

provides for "right of review" of agency wrong, created by §1552.

POINT II

THE BARRING UNDER §2401(a) OF THE MANDAMUS CLAIM TIMELY FILED IN 1983 HAS AN ADVERSE AFFECT OR AGGRIEVEMENT WITHIN RELEVANT STATUTE.

Where Congress under 10 U.S.C. §1552 has authorized the ABCMR to correct military record of error or injustice in the interest of justice and has provided 10 U.S.C. §702 for judicial review of those actions, inquiry as to standing must begin with determination of whether statute in question authorizes review at behest of the plaintiff. The failure of the court below to review petitioner's mandamus part of his suit that military violated its own rules and regulations in prejudice of one of its members or petitioner in denying him promotion, therefore has an adverse affect or aggrievement within said relevant statutes.

Petitioner has met the three elements which must exist before mandamus can issue: plaintiff has a clear right to the relief, the defendant has a clear duty to act, and no other adequate remedy is available.

The decision below and this Court's order herein denying writ are substantially prejudicial and so severe and serious as to infringe on Amendments I, V and XIV, if they are not reversed.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for rehearing, reverse its order, and reverse the decision below or vacate and remand it on the mandamus claim.

Respectfully submitted.

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June 2, 1987

APPENDICES

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

May 18, 1987

Mr. Clement J. Pacyna
1151 Wehrle Drive
Williamsville, NY 14221

Re: Clement J. Pacyna,
v. John O. Marsh, Jr.,
Secretary of the Army
No. 86-1136

Dear Mr. Pacyna:

The Court today entered the following order in the above entitled case.

The petition for a writ of certiorari is denied.

Very truly yours,

T/Joseph F. Spaniol, Jr.,
Clerk

S/Joseph F. Spaniol, Jr.